IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR.

JUDGMENT

S.B. CIVIL REVISION PETITION NO.36/2006

Tata Finance Ltd. vs. Mubarak Khan.

Date : 23.10.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.Sandeep Shah, for the petitioner.

Mr.Sanjay Nahar, for the respondent.

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REPORTABLE

Heard learned counsel for the parties.

The petitioner/defendant is aggrieved by the order dated 1.12.2005 passed by the court below dismissing the petitioner's application under Section 8 of the Arbitration & Conciliation Act, 1996 (for short 'the Act of 1996').

Brief facts of the case are that the plaintiff/respondent filed suit for injunction against the petitioner/defendant. On the first date 1.12.2004, the learned Presiding Officer of the Court was on leave and, therefore, the case

was adjourned for filing written statement. On 11.12.2004, time was sought for filing written statement. On 15.12.2004 i.e. on the next date, an application was submitted under Order 7 Rule 11 CPC for rejection of the plaint on the ground that there is an arbitration clause, therefore, the civil court has no jurisdiction to entertain the suit. With this application, the original arbitration agreement was not submitted by the defendant nor any copy was submitted. On 31.1.2005, copy of arbitration agreement was submitted by the defendant in the trial court. On 25.2.2005, another application under Section 8 of the Act of 1996 was submitted by the petitioner/ defendant.

The trial court did not decide the application filed under Order 7 Rule 11 CPC and proceeded to decide the application under Section 8 of the Act of 1996. The trial court vide its impugned order observed that the petitioner did not submit the original or the copy of the arbitration agreement along with the application under Order 7 Rule 11 CPC and, therefore, even if the application under Order 7 Rule 11 CPC is treated as application under Section 8 of the Act of 1996, then that was not accompanied with the copy of arbitration agreement. So far as the application filed under

Section 8 of the Act of 1996 is concerned, that was not filed at the first instance and, therefore, in view of Section 8(1), the matter cannot be referred to the Arbitrator.

Learned counsel for the petitioner submitted that in the application filed under Order 7 Rule 11 CPC, the petitioner's only ground was for referring the matter to the Arbitrator and the contents of the application alone can decide the nature of the application and not the title alone. In view of the above reason, the application was submitted by the petitioner for relief under Section 8 of the Act of 1996. It is also submitted that the arbitration agreement is admitted fact and copy of that was placed on the record of the trial court before decision on the application under Order 7 Rule 11 CPC or the application under Section 8 of the Act of 1996. It is also submitted that the trial court misread Section 8 of the Act of 1996 and proceeded to decide the application on assumption that the petitioner since took time for filing written statement, therefore, has not took the plea under Section 8 of the Act of 1996 at the first instance and before submitting his defence. The trial court proceeded to hold that since the petitioner sought time for filing written

statement, therefore, he cannot take benefit of Section 8 of the Act of 1996. In fact, Section 8 of the Act of 1996 is different than Section 34 of the Arbitration Act of 1940.

Learned counsel for the respondent vehemently submitted that the petitioner took time for filing written statement and fact of officer on leave is irrelevant. It is also submitted that the application under Order 7 Rule 11 CPC was submitted by taking a defence and, therefore, also, the petitioner's second application filed under Section 8 of the Act of 1996 was not maintainable. It is also submitted that admittedly copy of the agreement was not submitted along with any application. It was filed after the filing of the application under Order 7 Rule 11 CPC and before the filing of the application under Section 8 of the Act of 1996, therefore, the trial court rightly did not refer the matter to the Arbitrator.

I considered the submissions of learned counsel for the parties and perused the facts of the case.

Section 8(1) and 8(2) of the Act of 1996 read

as under :-

> “8. Power to refer parties to arbitration where there is an arbitration agreement. - (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.”

Section 34 of the Act of 1940 reads as under :-

> “34. Power to stay legal proceedings where there is an arbitration agreement. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there

> is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

It is clear from Sub-section (1) of Section 8 of the Act of 1996 that there is a change in the language used in Sub-section (1) of Section 8 of the Act of 1996 from the language as used in old Arbitration law i.e. Arbitration Act, 1940. The application under Section 34 could have been filed "...at any time before filing a written statement or taking any other steps in the proceedings.....". The words like "taking any other steps in the proceedings" have not been used in Sub-section (1) of Section 8 of the Act of 1996. Per contra, the specific words have been used in Sub-section (1) of Section 8 of the Act of 1996 which are "...so applies not later than when submitting his first statement on the substance of the dispute...". Therefore, an application under Sub-section (1) of Section 8 of the Act of 1996 can be filed before any statement is submitted on the substance of the dispute by the defendant.

Therefore, taking time for filing written statement was not relevant under Sub-section (1) of Section 8 of the Act of 1996. Therefore, the application of the petitioner under Section 8 of the Act of 1996 could not have been rejected on this ground by the court below.

Sub-section (2) of Section 8 of the Act of 1996 provides submitting of original arbitration agreement or a duly certified copy thereof along with the application. This Sub-section (2) of Section 8 of the Act of 1996 also very clearly provides that the application referred to in Sub-section (1) of Section 8 of the Act of 1996 shall not be entertained unless original or duly certified copy of the arbitration agreement is not submitted along with the application under Section 8 of the Act of 1996. The word “along with” cannot be read mechanically or literally. Can such application be rejected when the application and arbitration agreement are filed in Court at different time of the same day ? Answer can be negative only. Section 8(2) of the Act of 1996 nowhere provides that in case, such application is not accompanied by the original arbitration agreement or duly certified copy thereof, the application is liable to be rejected. In fact, the defect is curable defect only.

In the present case, the arbitration agreement is admitted fact and copy of arbitration agreement was submitted before submitting the application under Sub-section (1) of Section 8 of the Act of 1996. The arbitration agreement, if is already on record, whether the application subsequently filed can be rejected on the ground that the arbitration agreement is not accompanying the application filed under Sub-section (1) of Section 8 of the Act of 1996. The answer only can be in negative because of the reason that the purpose of Sub-section (2) of Section 8 of the Act of 1996 is of making available the original arbitration agreement or certified copy of arbitration agreement on the record of the court as it is foundational document for grant of relief on application and further so that the court can pass appropriate order of application filed under Sub-section (1) of Section 8 of the Act of 1996 without delay, that is without unnecessarily adjourning the matter for filing arbitration agreement by the parties. In this case, the first application under Order 7 Rule 11 CPC was not any statement on the substance of the dispute submitted by the defendant and the second application filed under Sub-section (1) of Section 8 of the Act of 1996 was an application under Sub-

section (1) of Section 8 of the Act of 1996 and was not a statement on the substance of the dispute submitted by the defendant. Therefore, in all respects, the application could not have been dismissed by the trial court and the trial court committed serious error of law in rejecting the petitioner's application.

In view of the above discussion, this revision petition is allowed, the order dated 1.12.2005 is set aside and the application filed by the petitioner under Sub-section (1) of Section 8 of the Act of 1996 is allowed.

The parties may now proceed to get the decision of the dispute through arbitrator by adopting the process for arbitration.

(PRAKASH TATIA), J.

S.Phophaliya